

1
2
3
4
5 UNITED STATES DISTRICT COURT
6 DISTRICT OF NEVADA

7 * * *

8 MICAH K. WELLMAN,

9 Plaintiff,

10 v.

11 DEPARTMENT OF JUSTICE, BUREAU
12 OF ALCOHOL, TOBACCO, FIREARMS
13 AND EXPLOSIVES,

14 Defendant.

Case No. 3:14-cv-00348-MMD-WGC

ORDER

(Def.'s Motion to Strike Plf.'s Amended
Complaint – ECF No. 26)

14 **I. SUMMARY**

15 Before the Court is Defendant Department of Justice, Bureau of Alcohol,
16 Tobacco, Firearms and Explosives' Motion to Strike Plaintiff's Amended Complaint
17 ("Motion"). (ECF No. 26.) The Court has reviewed the Motion, Plaintiff's response (ECF
18 No. 28), and Defendant's reply¹ (ECF No. 35). For the reasons discussed below,
19 Defendant's Motion is granted.

20 **II. RELEVANT BACKGROUND**

21 *Pro se* Plaintiff Micah K. Wellman brings this action under the Freedom of
22 Information Act ("FOIA"), 5 U.S.C. § 552, and the Administrative Procedures Act, 5
23 U.S.C. § 551 *et seq.*, seeking the production of agency records and emails concerning
24 an Internal Affairs investigation that Defendant had conducted. Plaintiff initially filed his
25 complaint on July 3, 2014. (ECF No. 1.) Defendant filed its first motion to dismiss (ECF
26 No. 11) on September 15, 2014, which this Court granted in part and denied in part while

27 ¹The Court granted Defendant's amended request for an extension of time to file
28 its reply (ECF No. 30) and denied Defendant's initial request (ECF No. 27) as moot.
(ECF No. 32.)

1 giving Plaintiff an opportunity to amend the initial complaint (ECF No. 17). Plaintiff then
2 filed his First Amended Complaint (“FAC”) on August 26, 2015. (ECF No. 18.) Defendant
3 moved for a second time to dismiss Plaintiff’s FAC pursuant to Fed. R. Civ. P. 12(b)(6)
4 but only as to his Administrative Procedures Act (“APA”) claim.² (ECF No. 20.) The Court
5 granted dismissal but gave leave for Plaintiff to amend his complaint to cure the
6 deficiencies with respect to his APA claim. (ECF No. 24.)

7 Defendant now moves to strike Plaintiff’s Second Amended Complaint (“SAC”),
8 specifically the portion of the SAC that amends the FOIA claim.

9 **III. DISCUSSION**

10 The Court’s September 7, 2016, Order permitted Plaintiff to amend his complaint
11 to specify the factual allegations that warrant relief under the APA pursuant to 5 U.S.C. §
12 552 (a)(F)(i). (ECF No. 24 at 4-5.) Specifically, the Court gave Plaintiff leave to amend
13 the complaint to allege facts that would permit a finding that the “circumstances
14 surrounding the withholding [of documents] raise questions whether agency personnel
15 acted arbitrarily and capriciously.” (*Id.* at 4 (quoting 5 U.S.C. § 552 (a)(F)(i)).) In the SAC,
16 Plaintiff added this language (ECF No. 25 at 5) but also added an additional paragraph
17 stating:

18 The defendants recent release on October 19, 2016, withheld 28 pages in full
19 siting [sic] FOIA exemptions (B)(5) and (B)(7)(c). Plaintiff challenges the broad
20 use of these exceptions to withhold entire pages. This broad use of these
exemptions to withhold entire documents is tantamount to withholding documents
under FOIA.

21 (*Id.* at ¶15.)

22 Defendant argues that Plaintiff’s unauthorized amendment of his FOIA claim
23 makes the SAC a “rogue document that should be stricken.” (ECF No. 26 at 3.) Under
24 Fed. R. Civ. P. 12(f), a “court may strike from a pleading . . . any redundant, immaterial,
25 impertinent, or scandalous matter.” Matter is “immaterial” if it has no bearing on the
26 controversy before the court. *In re 2TheMart.com, Inc Sec. Litig.*, 114 F. Supp. 2d 955,


27 ²Defendant filed an Answer to respond to Plaintiff’s Freedom of Information Act
28 (“FOIA”) claim. (ECF No. 19.)

1 965 (C.D. Cal. 2000). Allegations are “impertinent” if they are not responsive to the
2 issues that arise in the action and that are admissible as evidence. *Id.* The Court agrees
3 with Defendant that the allegations relating to Plaintiff’s FOIA request is immaterial to the
4 APA claim that the Court granted Plaintiff leave to amend. Plaintiff’s unauthorized
5 amendment of his FOIA claim amounts to an impertinent addition to the SAC, as the
6 Court did not permit such amendment.

7 **IV. CONCLUSION**

8 It is hereby ordered that Defendant’s Motion to Strike (ECF No. 26) is granted.
9 The Clerk is directed to strike the Second Amended Complaint (ECF No. 25). Plaintiff will
10 have fifteen (15) days from issuance of this Order to file a third amended complaint to
11 comply with this Order by removing paragraph 15 from the SAC. Failure to timely file an
12 amended complaint will result in dismissal of the APA claim with prejudice.

13 DATED THIS 18th day of May 2017.

14 
15
16 MIRANDA M. DU
17 UNITED STATES DISTRICT JUDGE
18
19
20
21
22
23
24
25
26
27
28